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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-291

UNITED STATES FIRE INSURANCE COMPANY,
Petitioner,

against

MARINE SULPHUR TRANSPORT CORPORATION,
MARINE TRANSPORT LINES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN A. SULLIVAN
of
CADWALADER, WICKERSHAM & TAFT
Counsel for Respondents
Marine Sulphur Transport Corporation
and Marine Transport Lines, Inc.

WILLIAM S. BUSCH,
FRED R. PROFETA, JR.,
Of Counsel.

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Opinions Below

The opinion of the District Court is reported at 312 F. Supp. 1081 and is reproduced in petitioner's appendix at pages 29a-49a. The opinion of the Court of Appeals for the Second Circuit is reported at 460 F. 2d 89 and will be found in the petitioner's appendix at pages 1a-27a.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Statutory Provision

The Federal statute described by the petitioner at page 3 of its brief as "relevant", namely, the Carriage of Goods by Sea Act, 46 U.S.C. § 1304, is not involved in this case.

Question Presented

The questions phrased by the petitioner at pages 2-3 of its brief are inapposite. None of them deals with the central issue of the effect of the detailed and very special form of the charter party executed by a charterer from whom the petitioner claims to derive its rights by subrogation, which barred the charterer and any one claiming under it from asserting a claim of unseaworthiness. The question is a very limited one, seemingly of interest only to the petitioner and the respondents, that relates to the specific charter party just mentioned and which would seem to be appropriately stated as follows:

> In this case of private carriage, where no obligation to carry the cargo safely was assumed by the vessel owner, was the petitioner, claiming to be the subrogee of the cargo owner, estopped by the language of the charter party and unable to sustain the burden of persuasion that rested on it on the basis of this Court's decision in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104 (1941)?

Statement

The limitation of liability proceeding which gave rise to the instant petition for certiorari is also the subject of another petition for certiorari, which was filed by the respondents herein on August 28, 1972 and was assigned No. 72-344. However, that petition deals with matters having a far broader scope than does the instant petition in that the disposition of this petition would appear to require no more than scrutiny of pertinent provisions of the

charter party executed by the owner of the cargo from whom this petitioner claims to derive rights by subrogation.

At the outset, it might be noted that the charter party demonstrates that the petitioner is completely in error in the claims made by it at pages 7, 8 and 9 of its petition that there was an incorporation into the charter party of the Carriage of Goods by Sea Act (46 U.S.C. § 1304) or of Section 4 of the Act. The charter party did not incorporate either that Act or that Section, and there was no agreement to make the burden of proof rules of the Act applicable to this contract of private carriage. Furthermore, the vessel owner did not assume, expressly or otherwise, any obligation for the safe carriage of the cargo. The only references made to the statute in question were limited to "privileges, rights, and immunities" in favor of the vessel and the vessel owner, and this was clearly perceived by the Court of Appeals in its decision (Pet. App., pp. 20a-26a). The entire charter party may be found in the Joint Appendix at pages 3685a-3736a.

In the early part of 1960, Texas Gulf Sulphur Company ("TGS"), a major domestic producer and shipper of dry and liquid sulphur, desirous of obtaining long term ocean transportation of its molten sulphur product, negotiated with Marine Transport Lines, Inc. ("MTL"), a private ocean carrier and one of the respondents herein, for the acquisition of a T-2 tanker that would be specially converted for the carriage of molten sulphur and be dedicated to the exclusive carriage of its molten sulphur cargoes under a long term consecutive voyage charter party.

TGS had theretofore developed expertise in the ocean transportation of molten sulphur in that it had under charter to it, from persons not parties to this litigation, a Liberty Ship that had been converted by Bethlehem Steel Corporation ("Bethlehem") for that trade and was known as the TGS #1. In order to satisfy itself that the tanker,

when converted, would be able to carry a minimum of 15,100 tons of molten sulphur, TGS participated in the discussions with representatives of Bethlehem on the design for the conversion of a T-2 tanker into a molten sulphur tanker, and thereafter participated actively with Bethlehem and respondents in surveys that were made of various T-2 tankers for the purpose of selecting one suitable for the contemplated conversion.

When the details of the design and the matter of the selection of a T-2 tanker had been resolved and the necessary approvals had been obtained, MTL's wholly owned subsidiary, Marine Sulphur Transport Corporation ("MSTC"), the other respondent herein, contracted with Bethlehem for the conversion and purchased the T-2 tanker selected and delivered it to Bethlehem for the conversion work and entered into a bareboat charter party with its parent, MTL, for the vessel effective on the re-delivery of the ship by Bethlehem. MTL in turn entered into the 12 year consecutive voyage charter party with TGS pursuant to which the latter obtained the full use to be made of the vessel following her conversion.

On the basis of the chartering arrangements outlined above, TGS had no privity of contract with the vessel owner, MSTC, and, therefore, had no basis on which to assert a claim against the vessel owner.* Petitioner here, claiming that it derives its rights by subrogation from TGS, stands in no different position from that of TGS, and it would appear that the balance of this statement need concern itself only with the special arrangements contained in the charter party that TGS executed with MTL.

In that charter party, TGS acknowledged its receipt and approval of the conversion contract and the plans and specifications relating to the conversion (Joint App., p. 3689a),

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* *Saris Steamship Co.* v. *Multifacs*, 375 F. 2d 577 (2nd Cir. 1967); and Poor, *Charter Parties and Ocean Bills of Lading* (5th Ed) §20.

reserved to itself the right to inspect and reject any material or workmanship relating to the conversion (Joint App., p. 3692a) and the right even to require the termination of the conversion contract (Joint App., p. 3692a). Beyond that, TGS committed itself, by the terms of the charter party, to accept the vessel as entirely seaworthy provided that the conversion of the vessel was carried out in accordance with the conversion contract and the plans and specifications approved by it (Joint App., pp. 3693a-94a). TGS obtained for itself the right, under the terms of the charter party, to have its own representative in residence at Bethlehem's yard for the purpose of checking the conversion of the vessel down to the point of its completion and readiness for delivery (Joint App. p. 3692a), and did in fact have its resident inspector attend at Bethlehem's yard for a period of months preceding the completion of the conversion (Staffa, Joint App., pp. 1907a *et seq*).

Pursuant to the procedure provided for in the charter party (Joint App., pp. 3693a-94a), that representative of TGS, at the point of the completion of the conversion, and simultaneously with the delivery by Bethlehem to MSTC and by MSTC to MTL of the vessel, delivered to MTL a written acceptance of the vessel as being, except for minor details of no relevance here, completely satisfactory to TGS and seaworthy in all respects (Staffa, Joint App., p. 3309a; pp. 4324a-25a).

The charter party even made specific provision for the loading practice to be followed by the vessel. That provision (Joint App., pp. 3689a-90a) was that the vessel was to make full use of her available freeboard, which is to say, load to her load line in order to permit the carriage of full cargoes for TGS, and the charter party provided that it was the readings of the "ullages" in the expansion trunks of the tank compartments that governed as between the parties (Jt. App., p. 3700a, Clause 14(c)). While the Courts

below seized on the shoreside tank gauge figure of 15,315 tons (Jt. App., pp. 3700a-3701a), the actual ullage readings (Jt. App., pp. 3737a-38a) showed that the vessel was in fact carrying only 15,260 tons on her departure on her final voyage so that the petitioner's subrogor and, of course, the petitioner can derive no benefit from the mistaken figure of 15,315 tons used by the Courts below even if any argument could properly be bottomed on any such figure to claim overloading when the uncontradicted evidence showed that the vessel never submerged her load line.

Under the charter party, TGS also gave MTL the benefit of numerous exceptions contained in a broad General Exceptions Clause (Clause 23, Joint App., pp. 3704a-06a).

The only grounds for unseaworthiness advanced by the Courts below, that might reasonably be considered to be related directly to the loss of the vessel on February 4, 1963 after she had completed 63 coastwise round trips under the charter party for TGS, were (a) an improper design of the conversion of the vessel and (b) the loading of the vessel down to her load line. But, in those areas, as noted above, TGS had bound itself by the provisions in the charter party and by its acceptance of the vessel as completely seaworthy.

While MTL made no agreement to carry the cargo safely, there was in fact a warranty on the part of TGS, and not MTL (Clause 3, Conversion Equipment, Joint App., pp. 3690a-91a), that, if certain conditions were met, the vessel could safely carry the cargo, to which warranty was attached a penalty of a liability on the part of TGS to MTL for certain costs that might be occasioned. Additionally, it might be noted that TGS, without any ownership interest in the vessel, nevertheless required MTL to cause TGS to be named as a insured in its Protection and Indemnity coverage (Clause 45, Insurance, Joint App., pp. 3731a-32a).

TGS, under the special provisions of the charter party here, was no ordinary bailor of an ordinary cargo and, on the basis of the facts in this case, completely estopped itself from asserting a claim against the respondents. Petitioner herein, claiming to derive its rights from TGS by subrogation,* stands in the shoes of TGS and is likewise estopped.

Argument

At pages 7, 8 and 9 of its petition, as noted at page 3, *supra,* the petitioner incorrectly stated that Section 4 of the Carriage of Goods by Sea Act was incorporated in the charter party. As correctly pointed out in the opinion of the Court of Appeals (Pet. App., pp. 22a), there was no such incorporation but only a limited incorporation, by reference, of particular benefits to the vessel that did not entail incorporation of the Act or of Section 4 itself. That decision was not a novel one. *Pannell* v. *United States Line Co.*, 263 F. 2d 497, 498 (2d Cir.) cert. den., 359 U. S. 1013 (1959).

Accordingly, in this case involving private carriage rather than common carriage, we are not concerned with the provisions of the Carriage of Goods by Sea Act but only with the language of a charter party for private carriage with its attendant freedom for the parties to exempt the carrier from liability for any cause. Longley, *Common Carriage of Cargo,* pp. 8-9. In this context, we agree with the petitioner to the extent of citing this Court's decision in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104 (1941), but we disagree with the petitioner's claim that this case is one in which this Court

* The Court of Appeals, in holding in favor of respondents, did not reach the respondent's argument that there was, in any event, a waiver of subrogation in this case, and that point will not be argued here since it is unnecessary to the instant discussion, but will be reserved for argument in the event that certiorari is granted.

should "re-affirm" the decision in *Commercial Molasses.* Instead, we say that this Court's decision in that case without more calls for the denial of this petition for certiorari.

Under the decision in *Commercial Molasses,* the burden of persuasion that unseaworthiness caused the loss of the cargo remained at all times with the petitioner. As indicated above, it was TGS, the subrogor of the petitioner, which flatly estopped itself and any subrogee from claiming that any element of vessel design or of the reconstruction of the vessel pursuant to that design or of the carriage of full loads of cargo constituted any element of unseaworthiness and it was only in those areas of supposed unseaworthiness that the Courts below even approached saying that some one of those elements might have been related to the loss of the vessel. In these circumstances, the unseaworthiness posited by the petitioner in its statement of the Questions Presented could not be established by the petitioner, which accordingly failed to sustain its burden of proof.

As we noted above, no obligation for the safe carriage of the cargo was assumed by MTL in the charter party, under the language of which it was TGS, this petitioner's subrogor, which made the only thing approaching a warranty that its molten sulphur cargo could be safely carried. In the circumstances, the petitioner's quotation, at pages 12-13 of the petition, of language from this Court's decision in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.,* 314 U. S. 104, 109, is simply misplaced, and the significance of that decision continues to be, as we maintain, that the petitioner here did not sustain, and could not sustain the burden of proof it had to carry under that decision.

Beyond the fact that the petition should be denied on the basis of that decision, we submit that the presentation made above shows that there is no significant question of general importance that merits consideration by this Court.

Conclusion

The Court of Appeals properly held that the petitioner did not sustain its burden of persuasion under this Court's decision in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104 (1941), and this petition for certiorari should be denied on that ground as well as on the further ground that there is a lack here of any question that merits consideration by this Court.

Dated: New York, N. Y.
September 13, 1972

Respectfully submitted,

JOHN A. SULLIVAN
One Wall Sreet
New York, N. Y. 10005
Counsel for Respondents